No. 1745.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

EXPLORATION MERCANTILE COMPANY, a Corporation,
Plaintiff in Error,
vs.
PACIFIC HARDWARE AND STEEL COMPANY, a Corporation, THE GIANT POWDER COMPANY, CONSOLIDATED, a Corporation, and J. A. FOLGER AND COMPANY, a Corporation, Petitioning Creditors,
Defendants in Error.

Brief of Defendants in Error

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Filed this.....day of.....1909.

F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The statement of facts set forth in the brief of plaintiffs in error is controverted. Briefly the facts are:

That on the 6th day of August, 1908, the Exploration Mercantile Company, a corporation, plaintiff in error herein, applied to the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, for a receiver for its property.

That at the time of said application said Exploration Mercantile Company was insolvent, and that its property, at a fair valuation, was insufficient to pay its debts.

That thereafter, and on the 12th day of September, 1908, while said Exploration Mercantile Company was still insolvent, and its property at a fair valuation was insufficient to pay its debts, the petitioning creditors, defendants in error, herein, filed their petition in the District Court of the United States for the District of Nevada, praying that said Exploration Mercantile Company be adjudicated a bankrupt within the purview of the acts of Congress relating to bankruptcy.

That to this original petition was filed a demurrer on behalf of said Exploration Mercantile Company, and a purported plea by Walter C. Stone, as an individual. That the said demurrer and plea came on duly for hearing, and was argued and submitted to said United States District Court, whereupon the said demurrer was sustained, with leave to the said petitioning creditors to file an amended petition.

That pursuant to such leave the creditors thereafter duly filed their amended petition, as set forth, beginning on page 1 of the transcript herein.

That no plea or demurrer was ever interposed to said amended petition and issue was joined, as to certain of the facts, in the answer set forth, beginning on page 15 of said transcript.

That thereafter the said matter came on regularly for trial on said amended petition and answer, the facts

were found as summarized above, and the said Exploration Mercantile Company was duly adjudicated a bankrupt.

Verdict, Transcript, pp. 26, 27;
Adjudication, Transcript, pp. 54, 55.

Plaintiff in error does not question any ruling as to the admission or rejection of evidence or any instruction of the court to the jury given or refused. The facts are therefore admitted.

"The verdict of a jury settles all questions of fact".

Lehnen vs. Dickson, 148 U. S. 71;
Bond vs. Dustin, 112 U. S. 609.

"The distinction between a writ of error which brings up matter of law only, and an appeal, which, unless expressly restricted, brings up both law and fact, has always been observed by this court, and been recognized by the legislation of Congress from the foundation of the government. Dower vs. Richards, 151 U. S. 658, 663, 38 L. Ed. 305, 307, 14 Sup. Ct. Rep. 452; Wiscart v. Dauchy, 3 Dall. 321, 1 L. Ed. 619.

"So far from any restriction being imposed by Section 25a, the language used is 'appeals, as in 'equity cases,' and on appeals in equity cases the whole case is open.

"But Congress did not thereby attempt to empower the appellate court to re-examine the facts determined by a jury under Section 19 otherwise than according to the rules of the common law. The provision applies to judgments 'adjudging or

> ' refusing to adjudge the defendant a bankrupt,' when trial by jury is not demanded, and the court of bankruptcy proceeds on its own findings of fact. In such case, the facts and the law are re-examinable on appeal, while the verdict of a jury on which judgment is entered concludes the issues of fact and the judgment is reviewable only for error of law.
>
> "And it follows that alleged errors 'in instruc-' tions given or refused or in the admission or re-' jection of evidence,' must appear by exceptions duly taken and preserved by bill of exceptions."
>
> Elliott vs. Toeppner, 187 U. S. 334, 47 Law Ed. 200, 203.

No exceptions have been taken or preserved by bill of exceptions and the cause comes on here squarely on the sufficiency of the pleadings.

I

All of the assignments of error and the arguments of plaintiff in error reduce themselves to the one proposition that on the face of the creditors' amended petition the District Court of the United States, as such, had no jurisdiction, but that the District Court of the First Judicial District of the State of Nevada had exclusive jurisdiction.

This being the case it is well settled that no writ of error or appeal lies to the United States Circuit Court of Appeals, but the question must be taken directly to the Supreme Court of the United States.

This Court, therefore, has no jurisdiction of the case

and the writ of error and all proceedings herein should be dismissed.

"That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases: In any case in which the jurisdiction of the court is in issue in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision. * * *

"Sec. 6. That the circuit court of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law.

"In McLish vs. Roff, 141 U. S. 661, 668, 12 Sup. Ct. 118, 120, the supreme court held that, after a final judgment in the circuit court, 'the party against whom it is rendered must elect whether he will take his writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court upon the whole of the case. If the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court.'

"In the case of The Alliance, 44 U. S. App. 52, 17 C. C. A. 124, and 70 Fed. 273, this court held that, to give the circuit court of appeals jurisdiction to review an appeal from the district court in admiralty under the act of March 3, 1891, it was necessary to present for review some question other than that of jurisdiction, and, as the case did

not present such a question, the appeal was dismissed.

"In Manufacturing Co. vs. Barber, 18 U. S. App. 476, 9 C. C. A. 79, and 60 Fed. 465, the circuit court of appeals for the seventh judicial circuit held the same doctrine upon a writ of error from the circuit court, and in that case the writ of error was dismissed. In the present case the substantial and only question is as to the power of the district court to render a personal judgment or decree against the company having the custody, control, and management of the steamer at the time of the accident. This is clearly a question of jurisdiction, which this court is not authorized to review. The appeal is therefore dismissed, at appellants' costs." Morrow, Circuit Judge.

The Annie Faxon, (C. C. A. 9th C.), 87 Fedr. Rep. 961.

II

Plaintiff in error is mistaken in its statement of facts in the following particulars:

1. In the assertion that Walter C. Stone, as an individual stockholder, filed in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, his complaint, in writing, as set forth on pages 7 to 10 of the transcript, herein, that C. E. Wylie asked, as director, to be appointed receiver and that the proceedings enumerated in pages one to three of the said brief are all the proceedings in the State Court.

The creditors' amended petition distinctly alleges,

and the jury has so found, that in pursuance of a conspiracy and agreement all of the directors and officers, acting for and on behalf, and as the act and deed of said corporation, which was then and there insolvent, caused to be filed in the said State Court, the pleadings set forth on pages 7 to 11 inclusive of the transcript herein, and further that on the said 6th day of August, A. D. 1908, said directors and officers of said Exploration Mercantile Company, a corporation, acting for and on behalf, and as the act and deed of said corporation which was then and there insolvent as aforesaid, moved the said State Court upon the said pleadings as above set forth, for an order, and said State Court, on said day made its order, appointing said C. E. Wylie receiver of the property of said Exploration Mercantile Company, a corporation, with full power to take charge of the assets, control and business of said company.

The creditors' amended petition sets forth the ultimate fact that the Exploration Mercantile Company applied for a receiver.

> "For the purpose of pleading, the ultimate fact to be proven need only be stated. The circumstances which tend to prove the ultimate fact, can be used for the purposes of evidence, but they have no place in the pleadings."
>
> McAllister vs. Kuhn, 96 U. S. 87;
> 31 Cyc. 49.

The plaintiff in error, having answered without objection, by demurrer or plea, to the form of the plead-

ings, and joined issue as to the facts in said creditors' amended petition, it cannot now, for the first time, object to the pleading for informality, but only if there is an absolute failure to state facts constituting a cause of action.

Nebeker vs. Harvey, (Utah), 60 Pac. 1029, 1031;
Geo. H. Fuller Desk Co. vs. McDade, 113 Cal. 360.

"At common law, indefiniteness and uncertainty, being defects of form in a pleading, are subject to a special but not a general demurrer."

31 Cyc. 281.

It is not only unnecessary, but would have been improper, to have set forth probative matter, such as, that a meeting of the board of directors was held, that the board passed a resolution authorizing corporate action, or to have set forth the manner of authority by which the agents of the corporation acted.

It necessarily follows, therefore, that there is nothing further which this Court can review, and the writ of error and proceedings herein must be dismissed.

2. In the assertion that "At the same time" (of the filing of its answer) "W. C. Stone, plaintiff in the "action in the State Court, filed his separate plea to "the jurisdiction of the District Court under the "creditors' petition, which was not replied to or set "down for argument."

It appears by the endorsement, set forth on page 26 of the transcript herein, that this alleged plea was filed

September 17th, 1908, whereas, it appears by the endorsement set forth on page 15 of said transcript, that said creditors' amended petition was filed October 4, 1908.

The said purported plea of W. C. Stone was filed at the time of demurring to the creditors' original petition. It must be wholly disregarded, because:

1. Walter C. Stone is not a party nor entitled to a hearing on the issue of involuntary bankruptcy.

2. The service of the injunction upon him does not make him a party.

> Carr vs. Whitaker, 5 Natl. Bank R. 175;
> 7612 Fed. Cas.

3. So far as it appears he has no provable claim.

> Loveland on Bankruptcy, 3d ed. 262;
> In re Columbia Real Estate Co., 112 Fed. R. 643, 647.

4. Under the 32nd equity rule a defendant can demur or plead to a whole plea or to part of it, and he may demur to part, plead to part, and answer to residue, but there is no warrant for a stranger to the record interposing a plea.

5. A valid plea would have been exhausted when the demurrer to the creditors' petition was sustained and became an absolute nullity unless on motion to have it stand as a plea to the amended petition or a new plea was interposed.

6. This plea does not fall within the assignments of error filed herein.

Rule 24, sub. 6, C. C. A.

III

Proceeding now to answer the various arguments of plaintiff in error. It is claimed that it is impossible under the Nevada statutes for the corporation to have applied for a receiver and therefore could not commit an act of bankruptcy.

This cannot be true for the reasons so well stated in the opinion of the learned Judge set forth on pages 35 to 46 inclusive of the transcript herein, which is hereby adopted and made a part of this brief.

And furthermore in a case where one partner only made an assignment it was held that as the assignment purported to transfer all the property of the partnership, it was a general assignment by the partnership, though, as it purported to transfer only their joint, and not their individual, property, it was but a partial assignment by the individual partners. Whether, having been made by one partner only, it was valid, void or voidable is immaterial. Apparently the partner who did not join had ratified, by acquiescence, the act of the partner who executed it. However this may be, in denominating the making of a general assignment for the benefit of creditors an act of bankruptcy, Congress did not make any distinction between valid or invalid instruments, but used terms which would reach the execution of any instrument which is, or

purports to be, a general assignment. The majority of the Court are of the opinion that the making of the assignment by Meyer, being an act of bankruptcy of which he was the author, entitled the creditors to an adjudication against him individually. Held also that the partnership be adjudicated a bankrupt. The analogy to a corporation is stated. (U. S. C. C. A.)

In re Henry L. Meyer, 3 Am. B. R. 560;
In re Grant, 106 Fed. 496.

"The intention of the amendment of 1903 being clear, there would appear little doubt that any act, procedure, or process for the winding up of insolvent corporations or copartnerships, which substantially abridges or deprives creditors of the right to a trustee of their own choosing, or of the greater right to compel prorating between all creditors of the same class, or any other right given them by the bankruptcy law, will, provided the alleged bankrupt is insolvent at the time of the commission of the act complained of and that act be within the four months period, amount to an act of bankruptcy. The importance of this change cannot be overestimated."

Collier on Bankruptcy, 7th ed., p. 83.

It follows, therefore, that whether the application to the State Court was valid, void or voidable, is immaterial so long as the Exploration Mercantile Company made an application. That it did has been conclusively found. Also that it was then insolvent. It was therefore properly adjudged bankrupt.

IV

It is claimed that the proceedings in the State Court are conclusive and cannot be collaterally attacked. (Brief, p. 13.)

This contention has no application to this case for the reason that it is the very fact of the bankrupt presenting this and the other pleadings set forth in the said creditors' amended petition that constitutes the act of bankruptcy, the corporation being insolvent, and so long as the application is made by the corporation to the court for the appointment of a receiver the contents thereof are immaterial except as to the point that it is an application for a receiver. There is, therefore, no collateral attack on, or attempt to impeach or discredit the proceedings in the State Court.

The Federal Court, as a court of bankruptcy, has sole and exclusive jurisdiction over the proceedings.

The Congress shall have power—4. To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States.

Const. U. S., sec. 8, sub. 4.

Congress has made the bankruptcy courts the proper tribunals for such matters as the case at bar, and has given them exclusive jurisdiction.

R. S. 711, Ch. 80 U. S. Comp. Stats. 1901, p. 577.
Also found 1 Rose's Code Fed. Proc., p. 120.
Bankruptcy Act of 1898 as amended 1903, sec. 2, (1), (15).

While the national law was in force any proceedings commenced under the State law would have been null and void. The State law is suspended.

Sadler vs. Immel, 15 Nev. 265, 268.

The Federal Court will restrain the State Court proceeding which would defeat the act.

In re Hornstein, 122 Fed. R. 266, 271;
In re Knight, 125 Fed. R. 435;
Loveland on Bankruptcy, 3d ed., p. 111;
Remington on Bankruptcy, vol. 1, secs. 1602, 1605;
In re Brown, 91 Fed. R. 358.

To allow the bankrupt to select the trustee to administer upon his estate, instead of the creditors, as provided in the bankruptcy act, or to allow the State Court to take jurisdiction of the estate of the bankrupt, and administer and distribute it, would effectually destroy the efficiency of any bankrupt act that might be enacted by Congress, and thus effectually destroy the power granted to Congress to pass a bankrupt act.

In re John A. Ethridge Furniture Co., 92 Fed. Rep. 329, 332.

The rule that the bankruptcy court supersedes the custody of the State Court in cases of assignment, receiverships, etc., created within the four months' period, is said to have as its basis the necessary implication arising from such assignments and receiverships, being specifically declared to be acts of bankruptcy * * * the necessary implication arises, it is said, that the assignments and receiverships themselves become void.

1 Remington on Bankruptcy, sec. 1603, p. 967; Id., sec. 1634, p. 1008.

The bankrupt law is paramount to all the State insolvent laws, and where the effect of enforcing the State law is to defeat the object and provisions of the bankrupt act, that part of the State law must yield to the provisions of the latter.

Cresson & Clearfield Coal & Coke Co. vs. Stauffer, 148 Fed. R. 981.

The familiar rule announced in Peck vs. Jenness, 7 Howard, 612, 12 Law Ed. 841, that as between courts of concurrent jurisdiction the one which first obtains the *res* keeps jurisdiction has not application in the case at bar. That case was relied upon in the case of

In re Watts & Sachs, 190 U. S. 1;
See, also, Crochet vs. Red Rover, 155 Fed. 486.

V.

In a case having almost identical allegations the Supreme Court of Nevada has squarely held that all proceedings under the provisions of Section 94 of "An act providing a general corporation law." (Stats. 1903, p. 155, c. 88), based on a complaint which does not make all of the directors of the corporation parties in the complaint are absolutely void for want of jurisdiction. Two directors were not made parties in the complaint of Walter C. Stone in the said State Court, as appears from the record herein.

Golden vs. Averill, (Supr. Ct. Nev.), 101 Pac. 1021.

And plaintiff in error on pages 14 and 15 of its brief, has clearly shown the effect of void judgment. As it says: "It is a mere nullity." The proceeding in the State Court is therefore conclusive of nothing except that, as a matter of fact, the Exploration Mercantile Company applied to that court for the appointment of a receiver, and there is nothing to be collaterally attacked.

VI

The claim that the bankrupt corporation cannot apply for a receiver, or sue itself, has been fully answered in the preceding paragraph and in the opinion of the Court below. (Trans., pp. 35 to 46.)

VII

It is contended (p. 19 of the brief of plaintiff in error) that the application for a receiver must be made "under the laws of a State, of a Territory, or of the "United States."

If this were true that part of the opinion of the learned Judge of the District Court last referred to shows that it has been complied with, and, furthermore, the clause, "under the laws of a State, of a Ter- "ritory, or of the United States," modifies the phrase which it immediately follows, and which is carefully omitted and indicated by stars in the brief of plaintiff in error, and not the clause "Being insolvent applied "for a receiver or trustee for his property."

In case there be difficulty in interpreting the qualifying words of a sentence, the rule is to apply them to

such other words or phrase as shall immediately precede them therein, rather than to those more remote.

Gaither vs. Green, 40 La. Ann. 362, 4 South. 210.

In the construction of statutes, a limiting clause is to be restrained to the last antecedent, unless the subject-matter requires a different construction.

Cushing vs. Worrick, 75 Mass. (9 Gray), 382.

The relative "which" and the adjective "said" were held to refer to the last antecedent, whether a word or clause, and not to include a clause preceding the last.

Fowler vs. Tuttle, 24 N. H. (4 Fost.) 9.

And this is the view taken by the courts, and it is immaterial whether the complaint in the State Court was founded upon insolvency.

Five months before the passage of the amendment to the Bankruptcy Act of February 5, 1903, a petition signed by three directors of the alleged bankrupt, praying for an order dissolving the corporation, was presented to the Supreme Court of New York and a temporary receiver was appointed, pending the outcome of an order to show cause before a referee. Upon the report of the referee being returned, the attorneys for the petitioners moved for an order confirming the referee's report and appointing Milbury permanent receiver.

It was contended that the application was a continuing proceeding and was made prior to the amendment of 1903.

Held: Application was made April 23, 1903, by the three directors of the company "for an order confirming said referee's report, dissolving the said corporation, * * * and appointing a permanent receiver of said corporation." In this state of facts the Court said:

> "I find and report that this alleged bankrupt did, on April 23, 1903, being insolvent, apply for the appointment of a receiver, and that on April 24, 1903, because of insolvency, a receiver was put in charge of its property under the laws of the State of New York; that an act of bankruptcy was thereby committed."
>
> Matter of Milbury Co., 11 Am. B. R. 523.

It ill becomes plaintiff in error to argue that the petition of the creditors is framed by inuendo and legal conclusions to try to evade the plain provisions of the bankrupt law and that Congress did not intend that the appointment of a receiver over a solvent corporation or made in a proceeding not based upon insolvency should be an act of bankruptcy in view of the facts shown in the record here. (Trans., pp. 5, 6, 7, 10, 11, 12, 13, 46, 47, 48, 50, 51, 52.) The facts are properly pleaded and the alleged bankrupt was insolvent as heretofore shown. The prayer of the complaint in the State Court (Trans., p. 9) "for the order of this Court, appointing a receiver herein, to take charge of the affairs of said corporation, and conduct and manage the same, with a view to its dissolution," etc., in connection with the allegations of facts clearly shows, and the Court so found, that the fact of insolvency was well

understood and that the alleged bankrupt was itself attempting to evade the bankrupt act.

The cases of In re Perry Aldrich Co., 165 Fed. 249, and others like it, are all based on the other clause of section 3, subdivision 4 of the Bankrupt Act, namely, "because of insolvency a receiver or trustee has been "put in charge of his property under the laws of a "state, of a territory, or of the United States." In that case to commit an act of bankruptcy it is essential (a) that a receiver or trustee has been put in charge of his property, (b) because of insolvency. Obviously these cases correctly hold that the appointment of a receiver must be because of insolvency, and that fact must appear in the record and is conclusive. But such cases have no bearing on the cause at bar based on another act of bankruptcy. Congress cannot be supposed to have meant identically the same thing in setting forth the two separate acts of bankruptcy.

West Company vs. Lea, 174 U. S. 590 at 597, 598.

It requires no act whatever of the State Court, but only the application to it by the bankrupt, to make out an act of bankruptcy in the case at bar.

VIII

In view of the foregoing argument and the opinion of the United States District Court, sought to be answered in paragraph III of the brief of plaintiff in error, it is perhaps sufficient to say, that said paragraph III bears within itself its own condemnation as an argument for the plaintiff in error.

IX

It is contended that the learned trial Judge erred in holding that the Nevada Statute is essentially an insolvency act, and this contention is based upon the opinion of plaintiff in error: "Our Act of In- " corporation Law has no intent of any kind of being " an insolvent law, and besides the one necessary in- " gredient of every insolvent and bankrupt law, to wit: " an assignment and transfer of his property." This opinion is completely answered by the mere reading of the statute. The authorities cited on page 44 of its brief are not in point. The case particularly relied upon of Mayer vs. Hillman, 91 U. S. 496, was decided in 1876, long prior to the passage of the present bankruptcy act. The discussion as to whether or not the Ohio Statute in question was a bankruptcy act was unnecessary to the decision of the case and not made the basis of the court's decision. And, finally, it goes no further than to hold that a statute which prescribes a mode by which a trust created shall be enforced, which mode is substantially such as a court of chancery would apply in the absence of any statutory provision, and which did not otherwise change the existing law, is not an insolvent law. This is obvious, but has no application to the case at bar.

X

It is contended that the verdict of the jury is outside any triable issue on the ground that the bankruptcy act denies the right to plead solvency as a defense, in answer to a petition based on subdivision 4 of section 3 of the Bankruptcy Act of 1898.

But the provisions of said act cited, beginning on the bottom of page 44 of the brief of plaintiff in error, merely sets forth certain cases where the defense of solvency is proper and in no place in any way intimates that such a defense is not proper under subdivision 4. The act of bankruptcy under subdivision 4 upon which the creditors' amended petition is based, requires two elements to constitute an act of bankruptcy: (1) insolvency of the bankrupt, and (2) the application for a receiver. This being so, both elements are properly pleaded and either or both may be put in issue by answer. Again, the authorities cited are entirely beside the mark. It is claimed that this very contention of plaintiff in error is squarely decided in George M. West Co. vs. Lea Bros. & Co., 174 U. S. 590. But a reading of this case shows that the petition in involuntary bankruptcy was based upon subdivision (4) of section 3 of the Bankruptcy Act and holds only that "As a deed of general assignment for the benefit of "creditors is made by the bankruptcy act alone suffi- "cient to justify an adjudication in involuntary bank- "ruptcy against the debtor making such deed, without "reference to his solvency at the time of the filing of "the petition, that the denial of insolvency by way of "defense to a petition based upon the making of a deed "of general assignment, is not warranted by the bank- "ruptcy law."

This case was decided prior to the amendment of 1898. and of course has absolutely no bearing upon said subdivision (4) as amended.

This point being disposed of it carries with it and overcomes all the further arguments and authorities on pages 45 and 46 of the brief of plaintiffs in error.

It is therefore respectfully submitted that the action of the Honorable, the District Court of the United States for the District of Nevada, was correct, according to law and that the writ of error herein, and all proceedings in this Court should be dismissed.

.....J. L. Kennedy.....

Attorney and Solicitor for Pacific Hardware and Steel Company, Giant Powder Company, Consolidated, and J. A. Folger and Company, Petitioning Creditors, Defendants in Error.